REMARKS

Reconsideration of this application and entry of the above appearing amendment are respectfully requested.

Entry is appropriate because the Office action of July 28, 2004, was made "final" prematurely, as discussed below. Entry is also appropriate because the amendment will place the application into condition for immediate allowance.

Upon entry of the amendment, claims 1-64 and 66-67 will be canceled and claims 68-71 will be added. Claim 65 and 68-71 thus will be in the application.

Cited Patent

Claim 65 stands rejected as allegedly being anticipated by the teachings of U.S. Patent No. 5,399,132 (Bailey). That rejection now should be withdrawn.

Bailey does not show or suggest the "spaced apart" poles called for in claims 65 and 68. Bailey instead shows plural pole assemblies, all of which are immediately adjacent to one another.

Because Bailey used a lattice of interwoven ropes on "U-shaped" pole-structured members (e.g. made of tubing material) to form his barrier, it was necessary for Bailey to adjacently position his pole assemblies in order to completely surround a trampoline with a fall prevention barrier.

All things being equal, Bailey's adjacent pole assemblies require about twice the length of tubing (twice the weight of tubing) as comparable enclosure systems of claims 65 and 68. As compared to a comparable enclosure system of claim 65 or 68, a Bailey enclosure, with its adjacent pole assemblies, weighs at least twice as much. This difference in size and weight causes the Bailey system to have several disadvantages when compared to comparable enclosure systems of claim 65 or 68.

In his preferred enclosure (FIGS. 1-6), Bailey's adjacent pole assemblies are secured together with ropes. For that reason, Bailey's preferred enclosure has about twice the inertia or resistance to movement as comparable enclosure system of claim 65 or 68. This means that the body of a jumper impacting a preferred Bailey enclosure will need to absorb substantially more of the collision energy during the first moment of impact thus increasing the injury potential as compared to a spaced apart

pole configuration which has no more than about half the inertia of the Bailey enclosure. In a second configuration (FIG. 7) that is "not preferred" (col. 4, line 44), Bailey's adjacent poles do not appear to be lashed together by ropes. In this second configuration, wherein it is critical for Bailey's pole assemblies to be immediately adjacent to avoid gaps that would allow a jumper to fall off, Bailey's poles would have twice the mass and volume of tubing material as a comparable spaced-apart pole enclosure system of claims 65 or 68.

All the additional tubing material makes the Bailey enclosure more difficult to put up and take down.

As discussed beginning at page 29, line 19 of the specification, presently claimed enclosure systems typically can be provided in compact, lightweight packages as compared to the Bailey enclosure which, because it requires so much tubing material, is less portable and thus more cumbersome and costly for retailers and consumers to move and store.

And because twice the amount of tubing material is required, a Bailey enclosure typically would be much more expensive than a comparable, presently claimed enclosure system.

Furthermore, the Bailey patent does not teach or suggest a system where each pole terminates at an end positioned below the rebounding mat and at an end positioned five to eight feet above the rebounding mat as specified in claims 65 and 68. Prior to the present invention, it was not intuitive that such a system could be used safely and effectively.

The significance of the improvements is evidenced by the fact that, prior to the effective filing date of this patent application, sales of trampoline safety enclosures were miniscule despite a long-recognized need to reduce the injuries associated with trampoline use. The first truly successful trampoline enclosure systems were systems of the type defined by claims 65 and 68. Such systems first were distributed by JumpSport, Inc., which owns the present patent application and its progenitors. After JumpSport introduced enclosure systems of the type specified by claims 65 and 68, that employ relatively short, cost-effective poles, more than a million (1,000,000) of such enclosure systems (including systems made by infringers of the patents issued from the parent and grandparent applications) have been sold and have significantly reduced the occurrence of trampoline-related injuries.

Bailey worked diligently to commercialize and profit from the enclosure shown in his patent and he did sell some units, but Bailey's enclosure was not copied; and it did not achieve commercial

success in the marketplace. In contrast, JumpSport's enclosures, having spaced-apart, relatively short poles, quickly achieved commercial success and spawned several copyists who also distributed such enclosures. The unobviousness of JumpSport's enclosure systems, having relatively short, cost-effective, spaced apart poles of the type specified in claims 65 and 68, is demonstrated by the fact that neither Bailey nor anyone else marketed such enclosure systems before their introduction by JumpSport, Inc., and by the subsequent overwhelming success of such enclosure systems.

The enclosure systems of claims 65 and 68 are neither shown or suggested by the prior art, including Bailey. The rejection thus should be withdrawn.

Claim 68. Further with regard to claim 68, Bailey neither shows nor suggests "a protective covering located at the upper end of at least one of the poles", which is a substantial advantageous feature of the enclosure system of claim 68. Despite apparently extensive prior art searching conducted in association with the defense of a patent infringement lawsuit relating to the parent and grandparent patents (US 6,261,207 and US 6,053,845; *JumpSport, Inc. v. JumpKing, Inc., et al.*, U.S. District Court, ND Cal., No. C 01-4986 PJH), there was no discovery of a prior art trampoline enclosure system that employed a protective covering located at the upper ends of poles.

Claim 69. Bailey neither shows nor suggests "resilient material covering at least a portion of at least one of the poles above the level of the rebounding mat", which is a substantial advantageous feature of the enclosure system of claim 69. Despite apparently extensive prior art searching conducted in association with the defense of a patent infringement lawsuit relating to the parent and grandparent patents (US 6,261,207 and US 6,053,845; *JumpSport, Inc. v. JumpKing, Inc., et al.*, U.S. District Court, ND Cal., No. C 01-4986 PJH), there was no discovery of a prior art trampoline enclosure system that employed resilient material covering at least a portion of at least one of the poles of a trampoline enclosure system above the level of the rebounding mat.

Claims 70-71 refer to a type of pole that has two ends that are positioned below the rebounding mat, as would be the case with the members (shaped generally like an inverted U) that constitute the pole assemblies 18 of Bailey. Enclosure systems defined by claim 70-71 are nevertheless distinct from Bailey.

In particular, Bailey does not show or suggest the "spaced apart" poles called for in claims 70-71. Bailey instead shows pole assemblies, all of which are adjacent to one another. (JumpSport, Inc. was the first to disclose, via the issuance of US 6,053,845, an enclosure system having an independent, inverted U-shaped pole spaced apart from other independent poles.)

Because Bailey used a lattice of interwoven ropes on "U-shaped" pole-structured members (e.g. made of tubing material) to form his barrier, it was necessary for Bailey to adjacently position his pole assemblies in order to completely surround a trampoline with a fall prevention barrier.

All things being equal, Bailey's adjacent pole assemblies require about twice the length of tubing (twice the weight of tubing) as comparable enclosure systems of claims 70 and 71. As compared to a comparable enclosure system of claim 70 or 71, a Bailey enclosure, with its adjacent pole assemblies, weighs at least twice as much. This difference in size and weight causes the Bailey system to have several disadvantages when compared to comparable enclosure systems of claim 70 or 71.

In his preferred enclosure (FIGS. 1-6), Bailey's adjacent pole assemblies are secured together with ropes. For that reason, Baileys' preferred enclosure has about twice the inertia or resistance to movement as comparable enclosure system of claim 70 or 71. This means that the body of a jumper impacting a preferred Bailey enclosure will need to absorb substantially more of the collision energy during the first moment of impact thus increasing the injury potential as compared to a spaced apart pole configuration which has no more than about half the inertia of the Bailey enclosure. In a second configuration (FIG. 7) that is "not preferred" (col. 4, line 44), Bailey's adjacent poles do not appear to be lashed together by ropes. In this second configuration, wherein it is critical for Bailey's pole assemblies to be immediately adjacent to avoid gaps that would allow a jumper to fall off, Bailey's poles would have twice the mass and volume of tubing material as a comparable spaced-apart pole enclosure system of claim 70 or 71.

As discussed beginning at page 29, line 19 of the specification, enclosure systems of the present invention typically can be provided in compact, lightweight packages as compared to the Bailey enclosure which, because it requires so much tubing material, is less portable and thus more cumbersome and costly for retailers and consumers to move and store.

All the additional tubing material makes the Bailey enclosure more difficult to put up and take down than a comparable enclosure system of claim 70 or 71.

And because twice the amount of tubing material is required, a Bailey enclosure would be much more expensive than a comparable enclosure system of claim 70 or 71.

Inventorship

Correction of the inventorship for this application is requested as stated above. Upon receipt of an indication that the above-appearing claims are allowable, all the presently named applicants and Donald W. Strasser will submit a declaration evidencing that Mark W. Publicover and Donald W. Strasser are the inventors for this application as amended.

Summary of Prosecution and Request to Withdraw Finality

The Office action of July 28, 2004, was designated a "final" action. (See form PTOL-326 provided as a part of that Office action.)

The designation of finality should be withdrawn.

To fully understand the procedural posture of this application, the following summary is provided:

1) On October 8, 2003, the Patent and Trademark Office issued a restriction requirement for this application.

2) On March 12, 2004, an amendment and response to the restriction requirement was filed.

3) On July 28, 2004, the Office mailed a first substantive Office action, which was designated a "final" action. The action stated no reason why, as the first substantive Office action, it was made "final."

According to MPEP 706.07(b):

"The claims of a new application may be finally rejected in the first Office action in those situations where (A) the new application is a continuing application of, or a substitute for, an earlier application, and (B) all claims of the new application (1) are drawn to the same invention claimed in the earlier application, and (2) would have been properly finally rejected

on the grounds and art of record in the next Office action if they had been entered in the earlier application."

Claims 65-67 of the present application were the only claims that were examined substantively. Those claims were **not** drawn to the same invention claimed in an earlier application.

Therefore it was not proper to make the first substantive Office action "final."

It is requested (1) that finality be withdrawn, (2) that this amendment be entered, and (3) that this response be treated as a response to a non-final action.

Information Disclosure Statements

Information disclosure statements were filed on March 5, 2001, April 29, 2004, and July 2, 2004, for this application. A further information disclosure statement is being mailed to the Patent and Trademark Office on January 27, 2005.

It is respectfully requested that the referenced documents be considered and that such consideration be acknowledged.

Conclusion

This application is now in condition for allowance, and a Notice of Allowance is requested.

Respectfully submitted,

KLARQUIST SPARKMAN, LLP

By _____
Richard J. Polley
Registration No. 28,107

One World Trade Center, Suite 1600
121 S.W. Salmon Street
Portland, Oregon 97204
Telephone: (503) 595-5300
Facsimile: (503) 228-9446